



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Milwaukee County Department of Human Services, Petitioner

vs.

DECISION
ON GOOD CAUSE

(REHEARING)

██████████ Respondent

Case #: FOF - 174504

Pursuant to petition filed May 20, 2016, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Milwaukee County Department of Human Services, as petitioner, to disqualify ██████████ respondent, from receiving FoodShare benefits (FS) for a period of one year, a telephone hearing was held on Tuesday, September 6, 2016 at 11:30 A.M., at Milwaukee, Wisconsin. This hearing is de novo upon a motion for good cause, which was granted on August 2, 2016. This DECISION replaces in its entirety the DECISION issued by Administrative Law Judge Nancy Gagnon (retired) that was issued on July 18, 2016.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV) – First Offense.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: ██████████
Milwaukee Enrollment Services
1220 W. Vliet Street
Milwaukee, Wisconsin 53205

Respondent:

██████████
██████████
██████████
██████████

Respondent's Representative:

██████████
██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:
Kenneth D. Duren
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FS benefits in Milwaukee County from at least August 1, 2011 through July 31, 2012.
2. Due to the respondent's enrollment in the FS program, the respondent was issued a QUEST card which the respondent utilized to access her monthly FS allotment provided to respondent. QUEST cards are electronic benefit transfer cards that replaced food stamp coupon booklets.
3. On or about April 12, 2012, the respondent's QUEST card was utilized in a transaction involving [REDACTED]
4. [REDACTED] was a licensed vendor of the United States Department of Agriculture Food and Nutrition Service, which enabled it to redeem QUEST cards.
5. [REDACTED] was classified as a mobile vendor and operated out of private vehicles. Between August, 2010 and January, 2013, [REDACTED] redeemed approximately \$778,000 in QUEST benefits from food stamp benefit recipients who were not purchasing food, but instead receiving cash for providing access to their QUEST benefits.
6. On or about February 15, 2013, [REDACTED], doing business as [REDACTED], pled guilty to a charge of unlawfully purchasing and redeeming FS benefits. [REDACTED] admitted that no food or groceries were ever provided by [REDACTED] or [REDACTED] in exchange for Quest benefits.
7. On June 16, 2016, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent intentionally transferred FS benefits to [REDACTED], in the total amount of \$200, in exchange for cash payment(s).
8. The respondent was not a party to the \$200 transaction of FoodShare benefits that occurred with [REDACTED] [REDACTED] on April 12, 2012; she had no knowledge then or now of that transaction and did not authorize any other person to transact FS benefits for cash on that date or otherwise.
9. In April, 2012, the respondent had a minor child with health problems requiring frequent surgical procedures and had allowed a person caring for her other minor child to access her FS to buy food for the respondent's household.

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

Wisconsin statutes prohibit the intentional exchange of FS benefits for cash. The law specifically provides that to traffic food stamp program benefits means to do any of the following:

Buy, sell, steal, or otherwise accomplish the exchange of, directly, indirectly, in collusion with others, or individually, food stamp program benefits issued and accessed through the electronic benefit transfer program under s. [49.797](#), or by manual voucher and signature, for cash or other consideration that is not food.

Wis. Stat. §946.92(1)(dm); *see also*, 7 C.F.R. § 271.5(b).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact.

State v. Lossman, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

The respondent has affirmatively denied that she transacted \$200 of FS benefits with [REDACTED] on April 12, 2012, or authorized any other person to do so. She denies any knowledge of the [REDACTED] operation or fraudulent activity, and she denies ever so transacting FS benefits for cash with that business. Finally, she asserts that during the April, 2012, she did allow another, who was caring for her child, to use her FS card to buy food for her child. The respondent testified this was necessary because she had a sick child that was repeatedly in and out of surgical procedures and cares on an outpatient basis during the time period encompassing the transaction date.

Based upon the record before me, I find that the petitioner has not established by clear and convincing evidence that the respondent intentionally violated FS program rules. Rather, I conclude that she testified in a clear, consistent and convincing manner that she did not transact \$200 of FS with [REDACTED] on April 12, 2012. The petitioner agency was unable to rebut this testimony. Therefore, I must conclude that the petitioner incorrectly seeks to disqualify the respondent from the FS program for one year, and that this action must be reversed.

CONCLUSIONS OF LAW

The respondent did not intentionally violate, or intend to violate, the FS program rule specifying that an FS recipient shall not knowingly transfer food coupons except to purchase food; the administrative disqualification sanction must be reversed.

NOW, THEREFORE, it is

ORDERED

That the petitioner's determination that the respondent committed a first IPV of the FoodShare program is reversed and must be rescinded; and the petitioner agency must cease any and all disqualification actions against the respondent recipient's FoodShare benefits. These actions shall be completed within 10 days of the date of this Decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

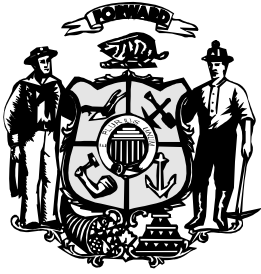
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 7th day of September, 2016

\sKenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals

c: Miles - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
[REDACTED] - email
[REDACTED]



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAMail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on September 7, 2016.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability

[REDACTED]

[REDACTED]